(4)

00-1636

Supreme Court, U.S.
FILED
JUN 8 2001
CLERK

In the Supreme Court of the United States

MICHAEL TEN EYCK, individually, THOMAS LINDERT, individually, CARMINE RESTIVO, individually, and ROBERT THOUBBORON, individually,

Petitioners,

v.

JOHN LEATHER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OBJECTIONS TO THE MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE A BRIEF IN SUPPORT OF PETITIONERS

KIM BERG
LOVETT & GOULD, ESQS.
Attorneys for Respondent
222 Bloomingdale Road
White Plains, New York 10605
914-428-8401

QUESTION PRESENTED

Should this Court grant *Amici Curiae's* motion to file a brief in support of Petitioners where their proposed brief merely reiterates the arguments previously put before this Court by Petitioners?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Reasons for Denying the *Amici Curiae's* Motion 2

1. The proposed brief *Amici Curiae* does not present any arguments that were not previously made by Petitioners in connection with their Petition for a Writ of Certiorari 2

2. The motion of the *Amici Curiae* further demonstrates the untimeliness of the Petition 5

Conclusion 7

TABLE OF AUTHORITIES

Cases

Cabrera v. City of Huntington Park,
159 F.3d 374 (9th Cir. 1998) 3

Figueroa v. Rivera, 147 F.3d 77 (1st Cir. 1998) 3

Heck v. Humphrey, 512 U.S. 477 (1994) ..... *passim*

Huey v. Stine, 230 F.3d 226 (6th Cir. 2000) 3

Randell v. Johnson, 227 F.3d 300 (5th Cir. 2000),
cert. denied, 121 S.Ct. 1601 (April 16, 2001) 3

Warner v. Orange County Dept. of Probation,
115 F.3d 1068 (2nd Cir. 1997) 3

Statutes

Rule 10 of the Rules of the Supreme Court of the
United States (1999) 1, 3

Rule 13 of the Rules of the Supreme Court of the
United States (1999) 5

Rule 37 of the Rules of the Supreme Court of the
United States (1999) 2,3,4

42 U.S.C. § 1983..... *passim*

STATEMENT OF THE CASE

A Petition for a writ of *certiorari* was previously filed and opposed. In connection with the opposition, the Respondent, John Leather, set forth several reasons why the Petition should be denied including: (1) the Petition did not meet the standards enunciated in Rule 10 for granting a writ of *certiorari*; and (2) the Petition was untimely in that it sought to challenge a decision of the United States Court of Appeals for the Second Circuit which decision was rendered almost two years ago.

Following John Leather's filing of his brief in opposition to the petition, *Amici Curiae* moved for leave to file a brief in support of the Petitioners, attaching to their motion a proposed brief. The proposed brief merely sets forth the same arguments previously made by Petitioners in support of the petition and therefore *Amici's* motion should be denied. Further, the proposed brief does not address, and certainly does not change, the fact that the underlying Petition is untimely.[1]

---

[1] It is for these reasons that Respondent did not consent to the filing of a brief by the *Amici Curiae*.

REASONS FOR DENYING THE PETITION FOR A WRIT OF *CERTIORARI*

1. The proposed brief *Amici Curiae* does not present any arguments that were not previously made by Petitioners in connection with their Petition for a Writ of *Certiorari*

The motion of *Amici Curiae* to file a brief in support of the Petition does not present any arguments that were not previously presented to this Court by the Petitioners. For these reasons, the Court should deny the instant motion.

> "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored."

Rule 37(1) of the Rules of the Supreme Court of the United States (1999).

Here, the proposed *Amici Curiae* brief simply repeats arguments previously put before this Court by the Petitioners. In short, *Amici's* argument that *Heck* has been called into question by other federal courts mirrors that previously put forth by Petitioners. See *Amici* Brief at p. 5-6; Pet. at p.8.

Refuting this argument, as noted in Leather's brief in opposition to the petition, the Petitioners themselves cited to the Circuit Courts' recent decisions which have correctly applied *Heck v. Humphrey*, 512 U.S. 477 (1994), and which therefore

necessarily confirm that *Heck* remains good law. *See* Pet. at p. 8, citing *Figueroa v. Rivera*, 147 F.3d 77, 80 (1st Cir. 1998); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000), *cert. denied*, 121 S.C. 1601 (April 16, 2001); *Huey v. Stine*, 230 F.3d 226, 229 (6th Cir.2000); *Cabrera v. City of Huntington Park*, 159 F.23d 374, 380, n.6 (9th Cir. 1998).

Adding to the confirmation that *Heck* remains good law is *Amici Curiae's* citation to another Second Circuit decision, *Warner v. Orange County Dept. of Probation*, 115 F.3d 1068 (2nd Cir. 1997), noting that the Second Circuit correctly stated *Heck's* rule of law and correctly applied *Heck* in that case. *See Amici* Brief at p. 6-7.

Since the Amici's brief does not bring to the Court's attention relevant matter not already brought to the Court's attention by the parties and since it does not alter the fact that the Petition does not meet the requirements of Rule 10 for granting a Petition for a Writ of *Certiorari*, the motion by *Amici Curiae* to file a brief in support of the Petition should be denied. *See* Rules 10 and 37 of the Rules of the Supreme Court of the United States (1999).

Furthermore, the *Amici's* motion should be denied for, like Petitioners, it fails to address the facts of Leather's §1983 claim which facts indisputably demonstrate the inapplicability of *Heck* to his claim.

Here, Leather's §1983 claim was premised in part on the fact that he was terminated from the County of Putnam's employ for violating a County policy which policy the County selectively enforced against Leather and failed to enforce against individuals similarly situated to Leather. *Heck* could not possibly bar Leather's claim that he was terminated in violation of the equal protection clause of the Fourteenth Amendment when the County determined to selectively enforce its internal

employment policies, as that claim could under no possible theory call into question Leather's underlying criminal conviction. Since on these facts Leather's §1983 damages claim did not imply or even call into question the lawfulness of Leather's arrest or conviction, *Heck* could not possibly apply to bar Leather's §1983 claim.

Moreover, the *Amici*, like Petitioners, also failed to address the single most important distinguishing factor of Leather's claim. Unlike *Heck*, who directly challenged his criminal conviction, Leather never did. In fact, Leather did the opposite in that not only did Leather's counsel in opening arguments advise the jury of the conviction but additionally Leather later adduced evidence at trial proving the conviction.

Thus, while the *Amici's* brief repeats arguments previously set forth by Petitioners, it similarly fails to address those aspects of Leather's claim which support the Second Circuit's determination that *Heck* did not apply to bar this §1983 claim. Since the proposed brief does not meet the standards set forth for filing an *amicus curiae* brief, in that it does not present any additional or new arguments relevant to the Petition, the *Amici's* motion should be denied in all respects. *See* Rule 37 of the Rules of the Supreme Court of the United States (1999).

2. The motion of the *Amici Curiae* further demonstrates the untimeliness of the Petition

The arguments initially proffered by Petitioners and repeated in the *Amici's* motion center around the Second Circuit Court of Appeal's determination that *Heck* did not apply to bar Leather's §1983 claim. Fatal to this petition, and warranting denial of *Amici's* motion, is the fact that the Second Circuit's substantive decision on *Heck's* inapplicability to this case was rendered almost two years ago on June 11, 1999. *See* Pet., App. C, 34a-46a (noting date of decision June 11, 1999); *Amici* Brief at 4.

Since a petition for a writ of *certiorari* must be filed within ninety days after entry of the judgment or order sought to be reviewed, the Petition is untimely. Rule 13(1) and (3) of the Rules of the Supreme Court of the United States (1999)

As explained by *Amici Curiae*, in connection with the second appeal of Leather's case to the Second Circuit, the Defendant County of Putnam attempted to reiterate that *Heck* should bar Leather's §1983 claim. However, the Second Circuit "refused to reconsider its earlier ruling that *Heck* should not apply to bar Leather's Section 1983 lawsuit in this case." *See Amici* Brief at 4.[2] In connection with that decision, the Second

---

[2] The Second Circuit correctly found that the County's reiteration that *Heck* should bar Leather's claim during the second appeal of this case was an argument for "reconsideration" of the Second Circuit's earlier ruling. To use the Second Circuit's words, the arguments concerning *Heck's* applicability to Leather's case were "rejected in [its] earlier decision in this case" and "the County's reprise add[ed] nothing that would make it proper for [the Court] to

Circuit did not render a determination as to the merits of *Heck* or rule on whether *Heck* applied to bar Leather's §1983 claim. *See* Pet., App. A at 8a.

Here, the Petitioners purport to seek review of a decision decided in January 2001 when in actuality no decision was rendered concerning *Heck* at that time. *See* Pet., App. A. Clearly the decision at issue was rendered by the Second Circuit on June 11, 1999. *See* Pet., App. C.

Since more than ninety days have passed since the Second Circuit Court of Appeal's determination that *Heck v. Humphrey* did not apply to bar Leather's selective prosecution claim, the Petition for a Writ of *Certiorari* is untimely. Thus, it necessarily follows that the *Amici Curiae's* motion to submit a Brief in support of this untimely Petition adds nothing of relevance to this Court's review of that Petition, does not alter the fact that the Petition is untimely, and the motion of the *Amici Curiae* should be therefore denied.

---

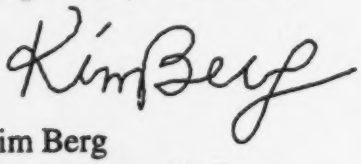
reconsider them." *See* Pet., App. A at 8a.

CONCLUSION

For the foregoing reasons, the motion of *Amici Curiae* to file a brief in support of Petitioners should be denied in all respects.

Dated: White Plains, New York
June 4, 2001

Respectfully submitted,



Kim Berg
Lovett & Gould, Esqs.
Attorneys for Respondent
222 Bloomingdale Road
White Plains, New York 10605
(914) 428-8401